INDEX

CITATIONS

Cases:	Page
Gulf Oil Corporation, Matter of, 4 N. L. R. B. 133	10
International Ass'n of Machinists v. *N. L. R. B.*, 110 F. (2d) 29, affirmed, 311 U. S. 72	12
Marlin-Rockwell Corp. v. *N. L. R. B.*, 116 F. (2d) 586, certiorari denied, 313 U. S. 594	12
National Labor Relations Board v. *Botany Worsted Mills*, 133 F. (2d) 876, certiorari denied, 319 U. S. 751	10, 12
National Labor Relations Board v. *Oliver Machinery Co.*, decided December 16, 1943 (C. C. A. 6)	10
Pacific Gas & Electric Co., Matter of, 44 N. L. R. B. 665	10
Pittsburgh Plate Glass Co. v. *N. L. R. B.*, 113 F. (2d) 698, affirmed, 313 U. S. 146	2, 12
Pittsburgh Plate Glass Co. v. *N. L. R. B.*, 313 U. S. 146	2, 12
R. C. A. Communications, Inc., Matter of, 2 N. L. R. B. 1100	9
Swift & Co., Matter of, 42 N. L. R. B. 1184	10
Miscellaneous:	
National Labor Relations Board:	
Third Annual Report (1938), pp. 157–158	11
Fourth Annual Report (1939), pp. 83–84	11
Fifth Annual Report (1940), pp. 64, 70–71	11
Sixth Annual Report (1941), pp. 63, 70	11

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 336

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HEARST PUBLICATIONS, INCORPORATED

No. 337

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

STOCKHOLDERS PUBLISHING COMPANY, INC.

No. 338

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HEARST PUBLICATIONS, INCORPORATED

No. 339

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE TIMES-MIRROR COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

This reply brief is addressed to respondents' challenge of the Board's determination of the appropriate bargaining units, a point not passed upon by the court below. Generally, with respect to the criteria which may properly be utilized by the Board in making unit determinations, see *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U. S. 146.

With respect to the News, the Board found that the following group of employees constituted an appropriate bargaining unit: all full-time newsboys and checkmen who are engaged to sell the News within Los Angeles, California, excluding bootjackers, temporary, casual, and part-time newsboys (R. 115). "Full-time" newsboys were defined to include newsboys who sell to the general public the Five, Six, Eight, Nine and Ten Star or the Six, Eight, Nine and Ten Star editions of the News five or more days a week as well as those who sell the Four Star and previous editions of the News for a minimum of four hours per day between the hours of 4 a. m. and 10 a. m., five or more days a week (R. 142). The term "part-time" was defined to include newsboys selling fewer than the Six, Eight, Nine, and Ten Star editions of the News per day and newsboys selling the Four Star edition of the News less than four hours per day (R. 140). The term "bootjacker" was defined to mean newsboys who sell at places other than established corners (R. 112, 1139–1141).

The News argues that the Board's unit is improper because it is based upon an arbitrary definition of "full-time" employment and speculates that the definition adopted would exclude individuals who conceivably might work for substantial portions of a day or week (Br. 50–51).

Certainly a measure of full-time employment which is based upon a minimum of a five-day week is reasonable on its face, and it is equally reasonable to measure the work of morning newsboys by hours since they sell primarily one edition and of afternoon newsboys by editions since they sell four or five editions.[1] In any event, the objections urged by this respondent to the definition of "full-time" employment are hardly meritorious in view of the fact that the Board adopted precisely the definition to which this respondent had stipulated (R. 1140–1141, 139–

[1] The News prints ten editions daily. The first three editions are not sold on the city streets but are used for suburban dealers and routes (R. 1079–1080, 1143–1144). The fourth edition is sold on the streets in the morning and represents 30 to 35 percent of the total copies of the News sold on the streets (R. 1080, 1088). The fifth, sixth, eighth, ninth and tenth editions are sold on the streets in the afternoon by newsboys who also handle the Herald (R. 1079–1081, 1066, 789–790, 841, 851, 908). The seventh edition is used for route delivery only (R. 1081). The fourth edition is handled by a group of district men known as the morning men (R. 1082, 1113–1114, 1143–1144) and the other editions which are sold in the afternoon are handled by a different group of district men (R. 1081, 789–791, 1125).

140). The News also argues that the absence of a definition of checkmen or evidence as to their number vitiates the Board's unit determination (Br. 47–48). However, the News furnished a pay-roll list of all its checkmen (R. 1089–1093), and the record contains elaborate evidence as to their duties (R. 749–750, 790–791, 805, 808, 833–834, 899, 1089–1093, 1118, 1124, 1129). Nor is the News' contention that the record fails to show what percentage of the newsboys and checkmen are Union members (Br. 49–50) accurate. The eligibility list prepared at the time of the election showed 349 persons within the unit defined by the Board (R. 189). Of these, 191 voted to have the Union represent them (R. 189). The News did not object to the accuracy of the eligibility list (R. 165–168).

With respect to the Herald, the Board found the following group of employees to constitute an appropriate bargaining unit: All full-time newsboys and checkmen who are engaged to sell the Herald within Los Angeles, California, excluding bootjackers, temporary, casual, and part-time newsboys (R. 115). "Full-time" newsboys were defined (R. 141–142) to include newsboys who regularly sell to the public five or more editions per day, five or more days a week and "part-time" newsboys were defined as those selling less than five editions a day or for less than five days a week.

The record fully sustains the Board's exclusions from the unit. Bootjackers are roving news-

boys who have no established corners or spots but sell to the general public wherever they choose (R. 112). The record shows that bootjackers, temporary, and part-time newsboys are, for the most part, schoolboys; they sell papers after school, do not look upon their work as permanent or regular, nor depend upon it for a livelihood (R. 860–861, 865). As the union organizer testified (R. 864), "they don't work steady; they are going and coming and don't depend on it for a livelihood. That is, it don't make much difference whether they are working or not. In most instances they just work for spending money or something like that." The part-time newsboys' earnings vary from 50 cents to $1.50 or $2.00 a day (R. 865). On the other hand, the full-time newsboys are primarily mature or elderly men who look upon this work as a regular job and depend upon their daily earnings for support (Bd. Br. pp. 5–6).

The Herald finds the circumstance that the Board's unit with respect to the Herald does not exclude *all* schoolboys fatal to its appropriateness (Br. 96). But in shaping the unit the Board pointed out that those included in the unit are "*in general,* mature individuals who daily rely upon their earnings from the street vending of newspapers as their source of support" [italics supplied] (R. 115). Certainly the unit is not rendered inappropriate because it draws the line between full and part time and thereby includes those few school-

boys who happen to sell full time.[2] As in the case of the News, the Herald attacks the definition of "full-time" employment despite the fact that it stipulated to the meaning adopted by the Board (R. 58–60, 132–134).[3]

With respect to the Times, the Board found that the following group of employees constituted an appropriate bargaining unit: All newsboys engaged in the street sale of the Times at established spots 4 or more hours a day, five or more days a week, within Los Angeles and Glendale, California, except temporary newsboys (R. 116). "Established spot" is defined as a place where a newsboy has engaged in the street sales of the Times five or more days a week for a period of six consecutive months or more, and the term

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[2] It is apparent that the unit challenged consisted primarily of adults (R. 599, 713, 727, 735, 746, 799–800, 804, 859–860, 875, 878, 884, 896, 930, 939, 945, 981, 1117).

[3] The Herald, being an evening paper (R. 49), unlike the News (see n. 1, *supra*) does not have separate groups of district men for morning and afternoon editions but has only "one organization" (R. 546). The presses on its first edition begin running at 9:00 in the morning and on the last begin running at 5:00 in the afternoon (R. 546–547). The 9:00 o'clock edition is known as the Green Flash, the 10:30 as the Latest News, the 12:30 as the Sports Edition, the 2:30 as the Night Edition, the 4:00 as the Night Final, and the 5:00 as the Seven-Star or Race Extra (R. 546–547, 656, 682–685, 702, 711–713, 897–899, 913). The newsboys who "start work on one of our earlier editions, either the Green Flash or the Latest News, or the first Sports, and work from that time on until late in the evening" are referred to in the record by the Herald as "full-time" or "all day hustlers" (R. 613–631).

"temporary" newsboy refers to a newsboy who has engaged in the street sale of the Times for thirty days or less (R. 113–114, 1304–1305). This definition, which was offered by the Union and adopted by the Board was at no time opposed by the Times (see R. 1305).

Complementing the position of the Herald which attacks the Board's unit because it fails to exclude every schoolboy, the Times objects to the unit upon the ground, *inter alia*, that it excludes temporary employees who are not schoolboys (Br. 52–53). The Times' insistence (Br. 47–48) that the Board's unit determination is arbitrary because it excludes temporary and casual employees is unrealistic to the point of captiousness. And its unparticularized objections to the use of the term "established spot" scarcely prove that the Board improperly adopted it as a measure of regular as opposed to casual employment.

With respect to the Examiner, the Board found that the following group of employees constituted an appropriate bargaining unit: All newsboys engaged in the street sale of the Examiner at established spots four or more hours a day, five or more days a week, within Los Angeles, California, except temporary newsboys (R. 115–116). "Established spot" is defined as a place where a newsboy has engaged in the street sales of the Examiner five or more days a week for a period of six consecutive months or more, and the term "tempo-

rary" newsboy refers to a newsboy who has engaged in the street sale of the Examiner for thirty days or less (R. 113–114, 1347). This definition which was offered by the Union and adopted by the Board was at no time opposed by the Examiner (see R. 1347–1348).

The Examiner (Br. 63–65) challenges the unit because it might exclude some mature individuals dependent upon earnings from newspaper sales for a livelihood in situations where such individuals are casually employed. But the fact that the Board disregarded casual and unorthodox work patterns emphasizes rather than weakens the appropriateness of its unit determination. And a stable bargaining structure, erected upon regularity of tenure and full-time employment, is not to be destroyed because it has no room for some individuals who might resemble those to whom in general the Board desired to accord bargaining rights. The Examiner's attacks upon the unit in this respect becomes particularly far-fetched when it is noted that the Board's exclusions which are challenged are based upon diversity not of function but of tenure, and that those newsboys asserted to be unwarrantedly excluded from the unit become qualified for the unit as their service and tenure are regularized. Finally, the Board's unit exclusions cannot be rendered arbitrary as the Examiner seeks to do (Br. 65, n. 91) by positing hypothetical situations which are not shown to be

related to actual practice. Grouping employees for bargaining purposes is a practical matter and is guided by considerations far more flexible and dynamic than those urged by the Examiner. Indeed, all of the respondents have adopted an abstract approach to the unit problem which is wholly alien to the realities of collective bargaining, and which is indeed a counterpart of the view taken by them of the question whether newsboys are their employees.

The Times (Br. 50–52), the Examiner (Br. 65) and the Herald (Br. 97) seek to challenge the unit determination because the Board, in shaping the units, excluded newsboys selling newspapers in suburban Los Angeles with the exception of the newsboys selling the Times in Glendale. The Board's decision to exclude suburban newsboys except those selling the Times in Glendale rests upon a finding that the organization by the union had not been extended to the suburban group generally and that no other labor organization was seeking to represent respondents' employees on a more comprehensive scale (R. 115). In giving weight to this consideration, the Board drew upon long administrative experience and applied a well-established policy. As early as 1937 the Board stressed the "extent of organization" factor in its unit determinations as an important consideration in giving effect to the policies of the Act. *Matter of R. C. A. Communications, Inc.*, 2 N. L. R. B. 1109, 1115. In the same year the Board again

invoked the "extent of organization" principle in *Matter of Gulf Oil Corp.*, 4 N. L. R. B. 133, 137, and declared that, "whenever possible, it is obviously desirable that, in the determination of the appropriate unit, we render collective bargaining an immediate possibility." The "extent of organization" principle has since been reiterated by the Board in a long series of decisions[4] and has received judicial approval. *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. (2d) 876 (C. C. A. 3), certiorari denied, 319 U. S. 751; *National Labor Relations Board* v. *Oliver Machinery Co.*, decided December 16, 1943 (C. C. A. 6), enforcing without opinion 47 N. L. R. B. 440.

The Times asserts (Br. 54) that it will be inconvenient to bargain with such a unit since it may "be obliged to bargain with many units instead of one." But, as the court pointed out in the *Botany Worsted* case (133 F. (2d) at 879) "respondent does not consider it impractical to bargain with every single employee separately." The Examiner and the Herald contend that the unorganized suburban newsboys should have been grouped with those in Los Angeles. Had the Board dismissed the Union's petition for certification on this ground a large group of newsboys seeking

[4] National Labor Relations Board, *Third Annual Report* (1938), pp. 157–158; *Fourth Annual Report* (1939), pp. 83–84; *Sixth Annual Report* (1941), p. 63; *Matter of Swift & Co.*, 42 N. L. R. B. 1184; *Matter of Pacific Gas & Electric Co.*, 44 N. L. R. B. 665.

to bargain collectively would have been denied the opportunity of utilizing the machinery of the Act for the solution of their problems until such indefinite time in the future as newsboys selling respondents' newspapers throughout suburban Los Angeles should become organized. No justification for such a result is presented. The Board's refusal to dilute the unit by adding to it a group of geographically removed employees who are not interested in collective bargaining was plainly not an abuse of discretion.

As the foregoing analysis discloses, in grouping the newsboys in bargaining units, the Board considered (R. 115) (1) the relative tenure of employment, (2) the regularity of employment, (3) the diverse interests inherent in full-time and part-time or temporary work, (4) the difference in the working conditions of the bootjackers who are not assigned to a definite spot, (5) the extent of organization, and (6) the desires of the only labor organization seeking representation. These are factors which the Board has frequently considered decisive in determining the bargaining unit best suited to give effect to the policies of the Act.[8]

Far from being "so unreasonable or capricious as to pass the bounds of permissible discretion"

[8] See National Labor Relations Board, *Third Annual Report* (1938), pp. 157–158; *Fourth Annual Report* (1939), pp. 83, 84; cf. *Fifth Annual Report* (1940), pp. 64, 70–71; *Sixth Annual Report* (1941), pp. 63, 70.

(*Marlin-Rockwell Corp.* v. *National Labor Relations Board*, 116 F. (2d) 586, 587 (C. C. A. 2), certiorari denied, 313 U. S. 594),* the Board's unit determination is firmly based upon well-developed administrative standards for grouping employees for bargaining purposes. Application of these standards in the instant cases is not open to serious challenge.

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* The courts have uniformly held that an appropriate unit determination by the Board will not be disturbed unless arbitrary or capricious. E. g.; *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 113 F. (2d) 698 (C. C. A. 8), affirmed, 313 U. S. 146; *International Association of Machinists* v. *National Labor Relations Board*, 110 F. (2d) 29, 46 (App. D. C.), affirmed, 311 U. S. 72; *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. (2d) 876 (C. C. A. 3), certiorari denied, 319 U. S. 751.

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